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No. 04-1508

IN THE

Supreme Court of the United States

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The Special Counsel devotes most of his 29-page Opposition ("Opp.") to arguing that the Court should deny certiorari because, even if petitioners are correct, and there exists a federal reporter's privilege, he thinks he will be able to defeat it based on his *ex parte* evidentiary submission. Opp. 10-21. The Special Counsel is incorrect—and a respondent's claim that he will win on the merits is not a basis for denying review in any event—but the merits-based focus of the Special Counsel's brief is itself quite telling: By his silence in the face of so many compelling reasons to grant review, the Special Counsel effectively concedes that petitioners have satisfied the standards for obtaining certiorari.

Indeed, the Special Counsel fails to address, let alone dispute, the fact that the federal courts are in utter chaos over how to interpret this Court's 5-4 decision 33 years ago in *Branzburg v. Hayes*, 408 U.S. 665 (1972), or that the legal landscape has changed dramatically since *Branzburg* in a way that strongly supports recognition of confidential source protection. Since *Branzburg*, an overwhelming state consensus has developed recognizing confidential source protection; since *Branzburg*, Congress has affirmatively directed the federal courts to develop privileges under Rule 501; and since *Branzburg*, this Court's First Amendment jurisprudence has developed in a manner that has superseded *Branzburg*'s approach. Nor can the Special Counsel muster any response to petitioners' argument that Rule 501 and *Jaffee v. Redmond*, 518 U.S. 1 (1996), require recognition of a federal common law reporter's privilege.

The Special Counsel's assertion that there is no need for review under these compelling circumstances rings especially hollow in light of the *amicus* brief filed by 34 States and the District of Columbia. Relying on *Jaffee*, and emphasizing that 49 States and the District have now adopted reporter's "shield laws," the chief law enforcement officers of these jurisdictions urge this Court to grant review because the lack of

comparable federal protection—or "[u]ncertainty and confusion" regarding the existence of such protection—"undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them." States Br. 2-3.

The Special Counsel has no answer to any of these arguments. He does not and cannot deny that this is a case of national importance. And he fails in his attempt to distinguish decisions of this Court and two Circuits holding that the Due Process Clause requires that defendants be afforded the chance to review and challenge the evidence against them before they may be imprisoned.

A. The Special Counsel's Assertion That He Would Be Able To Defeat Whatever Reporter's Privilege This Court Might Recognize Is Irrelevant At The Certiorari Stage And Baseless In Any Event.

The Special Counsel's main argument is that the court of appeals "assumed" that a federal common law privilege exists and "merely held that any such privilege had been overcome on the particular facts of this case." Opp. 10. According to the Special Counsel, this ruling was correct and eliminates any basis for granting certiorari because it demonstrates that he will be able to defeat whatever privilege this Court might recognize. *Id.* at 11-16. The Special Counsel is wrong.

First, it is misleading to suggest that the court of appeals simply "assumed" that a federal reporter's privilege exists—to the contrary, the panel members sharply disagreed on this very issue, generating four separate opinions. Pet. App. 16a ("The Court is not of one mind on the existence of a common law privilege."); *id.* 24a-34a (Sentelle, J., concurring) (arguing against privilege and that only this Court can recognize one in light of *Branzburg*); *id.* 35a-44a (Henderson, J., concurring) (rejecting Judge Sentelle's view, but "declining to decide whether a reporter's privilege exists or to define its contours"); *id.* 45a-85a (Tatel, J., concurring) (urging recognition of a privilege). Far from making this the narrow, fact-bound issue the Special Counsel seeks to portray, the stark

conflict among the panel members mirrors what has been happening in the federal courts for three decades and powerfully supports the need for this Court's review. Pet. 8-21.

Second, while the panel did agree that "*if* [a common law] privilege applies here, it has been overcome" by the Special Counsel's *ex parte* evidentiary proffer, Pet. App. 16a (emphasis added), that hypothetical pronouncement based on secret evidence cannot possibly obviate the need for this Court's review. The court's reliance on the Special Counsel's *ex parte* submission as a basis to imprison and fine petitioners itself raises an important due process question that warrants review. Pet. 27-29; *see also infra* 9-10.

Moreover, because the court refused to decide whether a common law privilege exists, it never defined the contours of such a privilege; it is thus impossible to claim that the privilege provides no protection in this case. Judge Tatel correctly observed that "we cannot resolve this case without adopting some standard," Pet. App. 51a, but that is exactly what the court purported to do. Although Judge Tatel himself proposed a standard, Judge Henderson criticized it, and "she never indicate[d] what standard she would apply." *Id.* Indeed, while Judge Henderson stated that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect," Pet. App. 35a, she never assumed that a particular standard applies let alone analyzed any alternative formulations of the privilege. As Judge Tatel put it, "[w]ithout ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And without selecting some other test based on *Jaffee* and Rule 501, how could one know that such alternatives are plausible?" *Id.* 51a-52a.

The Special Counsel incorrectly suggests that petitioners intended to limit their arguments as to the potential scope of the privilege because they did not specifically ask the Court to adopt a particular standard in their Petition. Opp. 15-16. But petitioners did not discuss how to define the contours of

a common law or First Amendment privilege because those are issues that go to the merits, not because they intended to endorse or rule out any particular formulation.

In fact, there are numerous "plausible alternatives that would allow the reporters to prevail." Pet. App. 51a. For example, this Court, much as it did in *Jaffee*, may decide to "reject the balancing component of the privilege," and hold that the privilege generally protects confidential sources, subject to certain clearly defined exceptions designed to avert serious and imminent future harm. *See Jaffee*, 518 U.S. at 17-18 & n.19 ("we do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); *see also* Pet. App. 119a (Tatel, J., concurring in denial of rehearing en banc) (noting the possibility that reporters may hold a "qualified privilege, that is, a privilege subject to exceptions, much like the crime-fraud exception to the attorney-client privilege, and the imminent-harm exception for psychotherapist-patient communications") (citation omitted). Alternatively, this Court could decide that there is a reporter's privilege that applies unless protecting the source in the particular case would "'cause a miscarriage of justice.'" *Id.* 51a (citing N.D. CENT. CODE § 31-01-06.2; MINN. STAT. § 595.024; N.M. STAT. ANN. § 38-6-7).[1]

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[1] The Special Counsel incorrectly suggests that the choice this Court will face is between an "absolute" privilege and a "qualified" privilege that consists of a balancing test. In fact, the term "absolute" privilege is a misnomer. Even States with ostensibly "absolute" reporter's privileges, *e.g.*, Cal. Const. art. I, § 2(b), recognize exceptions. *See Delaney v. Superior Court*, 789 P.2d 934, 946-51 (Cal. 1990) (noting exception to absolute immunity provided by shield law where application jeopardizes criminal defendant's right to a fair trial and applying balancing test in such circumstances). Labels aside, the real choice is the one addressed in *Jaffee*—between (1) a privilege, subject to exceptions and (2) a balancing approach. As the *Jaffee* Court explained in choosing the former, "if the purpose of the privilege is to be served, the participants in the confidential conversation 'must be able to predict with some degree of certainty

The Special Counsel has offered no indication that he can meet an imminent-harm, miscarriage-of-justice, or similar standard and defeat the privilege in this case. Nor have petitioners been afforded the right to review and refute the Special Counsel's arguments and evidence for overriding any qualified balancing test this Court might establish. Accordingly, the Special Counsel's belief that he would be able to defeat, based on secret evidence, whatever federal privilege might be recognized cannot overcome the compelling reasons for granting certiorari in this case.

B. The Federal Common Law And First Amendment Questions Warrant This Court's Review.

1. Federal Common Law

The Special Counsel does not dispute petitioners' description of the conflicts among the circuits regarding the existence of a federal common law reporter's privilege under Rule 501. *See* Pet. 14-16. His only response is to contend that "there is no circuit conflict on [the] issue" whether such a privilege exists "in the context of a good faith grand jury investigation." Opp. 21. But he cites no other privilege known to law that applies everywhere except in the grand jury, and he ignores Federal Rule of Evidence 1101(c), which expressly provides that "[t]he rule with respect to privileges applies *at all stages* of *all actions, cases, and proceedings*" (emphasis added); *see also* FED. R. EVID. 1101(d)(2) (providing that Federal Rules of Evidence do not apply to grand jury proceedings "other than with respect to privileges"); *United States v. Calandra*, 414 U.S. 338, 346 (1974); Pet. 16.

Under Rule 1101, the many decisions recognizing a reporter's privilege in civil and criminal cases apply with equal force in the grand jury context and therefore conflict with the

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[Footnote continued from previous page]

whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." 518 U.S. at 17-18 (citation omitted).

ruling below and with other decisions rejecting the privilege in connection with grand jury subpoenas. *Compare United States v. Cuthbertson*, 630 F.2d 139, 146 (3d Cir. 1980) ("journalists have a federal common-law qualified privilege arising under Fed. R. Evid. 501 to refuse to divulge their confidential sources") *with In re Grand Jury Proceedings*, 5 F.3d 397, 399 (9th Cir. 1993) (rejecting common law reporter's privilege in case involving grand jury subpoena). Indeed, courts have recognized the privilege in the grand jury context by relying on decisions in civil and criminal cases. *See, e.g., In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc); *New York Times Co. v. Gonzales*, 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005).

The Special Counsel does not even attempt to respond to petitioners' argument that *Jaffee* and Rule 501 virtually compel recognition of a federal common law reporter's privilege. Pet. 16-20; *see also* States' Br. 6 ("Here, as in *Jaffee*, a 'consistent body' of policy determinations by State legislatures reflects both 'reason' and 'experience.'") (citations omitted). To be sure, the Special Counsel argues that petitioners have failed to produce sufficient proof that the absence of federal protection of confidential sources will impair newsgathering and thus the free flow of information to the public, Opp. 25 n.10 (citing *Branzburg*), but *Branzburg*'s apparent demand for empirical proof of the need for a privilege squarely contradicts *Jaffee*, 518 U.S. at 10, as well as *Swidler & Berlin v. United States*, 524 U.S. 399, 410 (1998) (applying Rule 501 to hold that attorney-client privilege survives client's death despite finding the "empirical evidence . . . scant and inconclusive"). This contradiction among the Court's decisions further supports review. Pet. 20-21.

Moreover, the undisputed record in this case, decisions of federal and state courts, as well as state legislatures, and our nation's history provide irrefutable proof that confidential sources are essential to effective news reporting. *See* Brief *Amici Curiae* of ABC, Inc., *et al.* at 6; Pet. 9-10, 25-26; *see also, e.g.*, Todd S. Purdum, *"Deep Throat" Unmasks*

Himself: Ex-No. 2 at F.B.I., N.Y. TIMES, Jun. 1, 2005 at A1, A15 (Carl Bernstein: "This is a case history and a case lesson of why it is so important that we have confidential sources .... There's no way this reporting could have been done, nor is there any way that good reporting at a lot of places can be done, without anonymous sources.").

2. The First Amendment

The Special Counsel argues at length, based on his reading of *Branzburg*, that he is correct on the merits and that there is no First Amendment-based reporter's privilege. Opp. 22-25. But he does not dispute that federal courts, and state courts of last resort, are sharply divided and confused regarding what *Branzburg* means on this very issue. Pet. 21-25. The Special Counsel simply takes one side in the debate that has raged around the nation for more than 30 years, and disregards the decisions that reject his interpretation.

Thus, for example, the Special Counsel relies on what he calls the "best reading of Justice Powell's concurring opinion," arguing that Justice Powell, whose vote was necessary to the majority, was merely "elaborating on the role of courts in cases of bad faith investigations." Opp. 24. But numerous circuit court decisions have taken precisely the opposite view—that Justice Powell's concurrence articulated his understanding that the Court intended to allow for development of First Amendment-based protection of confidential sources. Pet. 11-12; *see, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 715-16 (3d Cir. 1979) (explaining that Justice Powell "cast the deciding vote in *Branzburg*" and applying balancing test). Likewise, when confronted with a clear conflict between the decision below, rejecting a First Amendment privilege in the grand jury context, and the decision of a state court of last resort recognizing such a privilege, *In re Letellier*, 578 A.2d 722, 726 (Me. 1990), the Special Counsel simply announces that the latter "was wrongly decided." Opp. 28 n.11. But the issue at this stage, of course, is not which position is *correct*; the relevant question is whether there is conflict in the courts,

and the Special Counsel's merits-based argument is a glaring acknowledgment that such conflict exists.

The Special Counsel again seeks to distinguish some decisions on the basis that this case arises in the grand jury context, Opp. 26, but privileges do not vary in federal court depending on the nature of the proceedings. FED. R. EVID. 1101. And "grand juries are expected to 'operate within the limits of the First Amendment,' as well as the other provisions of the Constitution." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (quoting *Branzburg*, 408 U.S. at 708).

To the extent that some courts have felt constrained by *Branzburg* from recognizing First Amendment protection for confidential sources, it is time to revisit *Branzburg* because recent trends in this Court's jurisprudence fundamentally undermine *Branzburg*'s rationale. Pet. 24. The Special Counsel notes that the First Amendment cases cited by petitioners did not involve grand jury proceedings, Opp. 28 & n.11, but he does not deny the more basic point—that *Branzburg* clashes with this Court's more recent decisions holding "that generally applicable laws . . . require heightened scrutiny when they pose a genuine risk to First Amendment values." Br. *Amici Curiae* of American Society of Newspaper Editors, *et al.* at 2; *id.* at 3-11 (canvassing case law). This Court alone has the power to resolve the tension between *Branzburg* and its modern First Amendment jurisprudence.

C. The Due Process Question Warrants This Court's Review.

The decision below directly conflicts with decisions from this and other courts forbidding, as a matter of due process, imprisonment based on secret evidence. Pet. 27-29. The Special Counsel contends that this case is distinguishable because the privilege issue requires analysis of "the *government's* conduct of the investigation" rather than "the litigant's conduct." Opp. 18. But *Hamdi v. Rumsfeld* holds that where the "most elemental of liberty interests—the interest in being free from physical detention by one's own government" is at stake, due process requires that an imprisoned

person have received "notice of the factual basis for his [detention], and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker." 124 S. Ct. 2633, 2646-48 (2004). *Accord In re Oliver*, 333 U.S. 257 (1948); *Greene v. McElroy*, 360 U.S. 474 (1959). Neither *Hamdi* nor any other case recognizes the Special Counsel's purported distinction, which is baseless. The district court in this case made rulings that resulted in an order of physical detention. Under *Hamdi*, petitioners have a due process right to know, and must be given the chance to rebut, the facts and arguments that supposedly support the confinement order.

The Special Counsel concedes the availability of alternative procedures, such as disclosure to counsel under a protective order, but claims that any alternative "would have provided insufficient protection for grand jury secrecy." Opp. 17. The Special Counsel provides no support for this bare assertion, nor explains why this proceeding demands greater secrecy than *Hamdi* and other enemy combatant cases, where counsel have been allowed access to the evidence used to justify their clients' confinement.[2] Although the Special Counsel faults petitioners for failing to "argue that . . . the court of appeals relied on erroneous factual findings," Opp. 15-16, the entire point of petitioners' due process challenge is that the Special Counsel and the court have *withheld* the facts from them. The fact that the confinement order arises from a contempt proceeding raises special concerns, as this Court has recognized that "[u]nlike most areas of law, where a legislature defines both the sanctionable conduct and the penalty to

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[2] The Special Counsel does not suggest that petitioners' counsel would not abide by a protective order issued under Fed. R. Crim. P. 6(e). Moreover, the Special Counsel exaggerates the importance of grand jury secrecy in characterizing it as an absolute, when witnesses are free to disclose their testimony, and the subject matter here is widely known to witnesses, subjects and targets. Finally, although the Special Counsel suggests that allowing petitioners access to its secret submission "risks tainting . . . later testimony," Opp. 20, he admits that other than the testimony from Mr. Cooper and Ms. Miller, "the factual investigation" is "for all practical purposes complete." Opp. 10.

be imposed, civil contempt proceedings leave the offended judge solely responsible for identifying, prosecuting, adjudicating, and sanctioning the contumacious conduct." *UMWA v. Bagwell*, 512 U.S. 821, 831 (1994).

The Special Counsel contends that petitioners seek "extensive discovery" and "disclosure of all the other evidence gathered by the grand jury to date." Opp. 18-19 (citing *United States v. Dionisio*, 410 U.S. 1 (1973), and *United States v. Mara*, 410 U.S. 19 (1973)), and on that basis seeks to downplay the conflict between the ruling below and the decisions in *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983), and *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973). But petitioners are not seeking discovery from the Special Counsel. All they seek is access to the Special Counsel's *ex parte* submission, the contents of which were selected by the Special Counsel to support his arguments for holding petitioners in contempt and incarcerating Mr. Cooper.

The Special Counsel also asserts that this Court "approved" the use of secret evidence in *United States v. R. Enters., Inc.*, 498 U.S. 292 (1991). Opp. 18-19. But in that case, the Court addressed the reasonableness standard for subpoenas under FED. R. CRIM. P. 17, and did not address the question presented here—whether a witness asserting a *privilege* is entitled to see the evidence and legal arguments against him before he is imprisoned. This Court did not "approve" *ex parte* proceedings, but simply noted in dicta that a court assessing the reasonableness of a subpoena may require additional disclosures from the government. *Id.* at 302. Although the Court noted that certain procedural protections are limited in the grand jury context, *id.* at 297-99, privileges are fully applicable. *See* FED. R. EVID. 1101. The Due Process Clause simply will not tolerate the use of secret evidence to incarcerate or fine witnesses who assert such privileges.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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